REASONS FOR GRANTING THE WRIT.

(1) The Appellate and Supreme Court decisions have left a void, with respect to the means-of-support requirement, which this court ought to consider, there being we feel denial of due process here as well as public policy, in a most serious aspect.

(2) The Federal cases of *Rogers* v. *Dwight*, and, *Seal* v. *American Legion*, the former District and the latter Court of Appeals conflict; and, with the *Waynick* decision now, there seems to be even more uncertainty, which this court we submit should settle, i.e., public policy, again.

(3) Possibly most serious, is the denial of due process to children who obviously are unable to sue for themselves until they do attain their majority. For those years there is a most serious void.

(4) Neither Illinois court of review ruled as to the individual right to sue for the maximum under the Dram Shop Act, instead of being restricted to a group-recovery of the maximum, which we feel is also denial of due process.

To hold that it is necessary that support had in fact been provided, to support a cause of action under Dram Shop, is against public policy,

Rogers v. *Dwight*, 145 F. Supp. 537;
Killham v. *Chaloupka*, 195 Ill. App. 182;
Danhof v. *Osborne*, 10 Ill. App. 2d. 529, 135 N.E. 2d 492;
19 Iil. Digest (Burdette-Smith) 327, 328;

and, further, in effect, it amounts to a wrongful taking of the right of a person to sue, in other words, a violation of

the due process clause of the Federal Constitution. The citations holding to the contrary, and that part of the Appellate court opinion, are plainly unrealistic. In the not infrequent case where the husband spends his money, or a substantial part, on drink from the very inception of the marriage; in the also not infrequent case where he not only squanders his money on drink but deserts his family, and like cases, how can the neglected wife and children compel him to bring a Dram Shop suit, as the "provider?" These contrary-holding decisions put a premium on drinking and failure to support. Is it not realistic to argue that bartenders and others dispensing drink may well encourage them to spend their earnings on drink, they knowing—if these decisions are upheld—that all they have to argue is: "I never did support my wife and children, therefore, the Dram Shop Act cannot apply."

It seems to us, if the Appellate court holding the above were upheld, that harsh and serious results must envelop unfortunate wives and children—wayward husbands and fathers would *be encouraged* not to provide support. The simple fact that one is a husband and/or father, should be more than sufficient, in that he is legally, morally, bound to support his family. The family is entitled to such support, and if not so received, no matter whether it was ever given or not, should be sufficient—in the soundest of sound public policy, for a cause of action, under the Act. This we submit should be the wholesome, sound, in the public interest, public policy. Moral, legal obligations should be supported and protected, not subject to ready evasion, in law, by simply ignoring or evading them. We argue, therefore, that to take away the right of a wife, who has never been or has not been, since any given time, supported, to sue in these cases is the unlawful taking away of her day

in court, her constitutional right to sue for redress. The right to sue is a property right, the taking away of that right is a violation of the due process.

It is contrary to sound public policy to hold a minor to a one-year statute of limitations. The Act was intended to protect the family of a drunkard against immediate or probable want of adequate support, same decisions as (4) above. From the digest volume we read: "Although the Dram Shop Act is penal in character and should be strictly construed, the act is also remedial and should be so construed as to suppress the mischief and advance the remedy." The *Danhof* case, on pages 497-8 of the Northeastern volume, contains the following rather strong language:

> "• • • He who deliberately sells that which he knows will inflame the passions, deprive the party of the control of judgment, and render him, for the time being, incapable of exercising proper care for personal safety, or that of his property, must be prepared for the consequences that may follow • • •."

It is the duty of the courts to protect rights of infants, whether or not the proper relief is asked in the pleadings • • • 43 CJS 271 sec. 105. It is the public policy of this state that courts should guard carefully the rights of minors, which should not be precluded unless clearly debarred by some statute or constitutional provision. *Desiron* v. *Peloza*, 308 Ill. App. 582, 32 N.E. 2d 316. In this case it was held that the minor, as a matter of public policy, has the right to sue within the limitation period *after* attaining majority, and, continues on page 322 of the Northeastern volume:

> "• • • and surely the minor should not be deprived of her rights by the laches or neglect of a recreant guardian• • •".

The Act says that the statute is to run *after the cause of action has accrued*. We submit, that the cause of action, insofar as a minor is concerned, accrues within the year after the attainment of majority. The injury is a continuing one. Habitual drunkenness develops over a long period, *Lloyd* v. *Kelly*, 48 Ill. App. 554; 54 CJS 127; the *Rogers* case. *Seal* v. *American Legion*, 245 F. 2d 908, holding to the one-year limitation irrespective of minority, we feel, is contrary to sound public policy, and should not be followed. In that case, as well as in the case here, the minors could do nothing themselves, someone else, whether parent or guardian or next friend, had to commence the action. And where they fail to do so, is it fair to punish the minor? It is submitted, that for such cases our Limitation Act exists, for the particular protection of those unable to defend themselves, or unable to avail themselves of their rights to sue, i.e. sound public policy. It is for the same reasons, that in no case may an action be prosecuted *against* an infant, unless a guardian ad litem has been appointed. In those cases the law compels protection for the minor, yet in the Dram Shop cases, where the parent may deliberately drink, deliberately fail to support his family, with the full knowledge, yes, even connivance of the drink dispensers, his right of action is taken from him. This is unfair, this is taking of property, i.e., a right to sue, without due process.

The language in 19 Ill. Digest (Burdette-Smith) 335, key 290, expresses the situation:

> "If husband had already become a drunkard and for that cause had ceased to support wife, defendant saloon keepers selling the husband liquor would be just as responsible for continuing the loss as for causing it in the first place * * *".

And in the *Rogers* case, on page 539 it said:

> "The above cases point out the object of the Dram Shop legislation, that is, the public policy of the State of Illinois. In the construction of the statute, it is of utmost importance that we keep that public policy well in mind. Habitual drunkenness and its effect on the support and welfare of dependents is a condition which generally develops over a long period of time. Since the Illinois legislature has given a cause of action to those injured through habitual drunkenness, the court finds the injury to the plaintiffs a continuing tort with the running of the limitation beginning from the date of the last injury * * * it may be broadly stated that, where a tort involved a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of last injury, or when the tortious overt acts cease, 54 C.J.S. 127. Any other construction of * * * limitations would tend to defeat the expressed public policy as set forth by the legislature".

The then 2-year limitation period was held no defense.

The late case of *Waynick, et al* v. *Chicago's Last Department Store, et al*; 269 F. 2d 322, decided in July of 1959, brings new and additional reasoning in these type of cases. The court there said, on page 325:

> "It is apparent in the case at bar that there are circumstances which make the sales of liquor * * * wilful violations of sec. 131. These * * * were not usual sales to adults or ordinary men. They were sales to intoxicated persons * * * Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him. 65 CJS Negligence sec. 4, p. 340. One essential element in a tort is the existence of a duty imposed by statute or otherwise in favor of the party injured and on the party whose conduct produces the injury. 86 CJS Torts, sec. 6, p. 926. The duty, breach of which may constitute negligence, may be a duty to the

person injured as an individual, but this is not essential, since it is sufficient that the duty was owed to him as a member of a class or group. 65 CJS Negligence, sec. 4, p. 340. The Illinois act making unlawful the sale of alcoholic liquor to any intoxicated person is for the protection of any member of the public who might be injured or damaged as a result of the drunkenness to which the particular sale of alcoholics contributes. Obviously the plaintiffs in the case at bar are entitled (page 326) to the protection given by sec. 131 • • •

"It will be noted that, in availing themselves of that protection, plaintiffs are in no way relying upon those parts of the Illinois act imposing civil damage liability (which was unknown to the common law), resulting from lawful sales of intoxicating liquor to a competent person, commonly known as Dram Shop Act cases. The effect of 131 • • • is that a sale of alcoholic liquor cannot lawfully be made to an intoxicated person. This is not inconsistent with the right of any competent adult to buy alcoholic liquor • • •

"In applying the common law to • • • this case, we must consider the law of tort liability, even though the chain of events • • • crossed state • • • lines • • • We hold that, under the facts • • • in the complaint, the tavern keepers are liable in tort for the damages and injuries • • • as a result of the unlawful acts of (the tavern keepers) • • •"

Adding this reasoning to that of *Rogers v. Dwight*, we submit is far more a wise public policy, especially when minors who are unable to defend themselves by way of filing suits for redress, than the result in *Seal v. American Legion*. We comment further. We have more than enough troubles today with aid to dependent children, and like cases, without encouraging more. Rights of adopted children, and adoption does not relieve natural father from his duty to support child when necessary. *In Re Tilliski's Estate*, 323 Ill. App. 490; and, *Anderson* v. *Anderson*, 320 Ill. App. 75, 49 N.E. 2d 841.

We would feel remiss in our duty in not calling the attention of the court with respect to the current law in re: each person having the right to sue in his or her own name, individually, for the maximum amount. For, we feel, to compel many to be restricted to one combined maximum, would and does place a single plaintiff in the same position as multiple claimants, irrespective of number. We earnestly ask that this be reviewed, and each individual given his right to so sue. For, to so deprive each individual, is violation of the due process clause.

As to rights of a divorced wife we cite 48 C.J.S. 725; and, *Cope* v. *Gepford*, 326 Ill. App. 171, 61 N.E. 2d 394. The case citation involved a habitual drunkard case and the court held that the husband father was under a "legal obligation to support". In the case at bar, the decree had reserved jurisdiction as to alimony; the divorce court had entered a judgment for accrued support for the children. Under these circumstances, to prevent plaintiffs' recovering, we submit too, is denial of due process. What good are rights to sue, what good are rights of judgments, if they are denied enforcement under circumstances amounting to unsound policy?

ADDITIONAL SPECIAL POINT.

We call attention to the paragraph in the Appellate opinion p. 17, identified by us as IIa, these reasons: the citation noted therein was only one of ten that appellees had in their brief, *not a single one of which*, had any bearing, in any manner, on the alleged point raised, namely, with respect to injury being necessary to recover for failure to support. We submit, by referring to that single citation, with no other comment except as stated in the opinion, amounts to a glossing over of a serious matter. We spent several days in checking, and rechecking these ten alleged citations. Where citations have no bearing on the point supposedly in issue, especially where numerous, as a result of which opposing party is compelled to spend substantial time in checking same, and in replying thereto, all of which was patently unnecessary and uncalled for, the court should take appropriate action against the offending party, by assessing costs, amply. To permit such time-wasting practice to go unchecked is unfair to the courts and counsel. We earnestly submit this should be ruled upon here, if possible, in the general interest of the legal profession and the judiciary.

Respectfully submitted,

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Of Counsel.

APPENDIX "A"

Opinion of the Appellate Court of Illinois.

Mr. Presiding Justice Bryant Delivered the Opinion of the Court.

1. This is a suit arising under the Dram Shop Act (Ill. Rev. Stat. 1957, Chap. 43, sec. 135) for failure of support by the husband, brought by Beatrice Lowrey, for herself and on behalf of her two minor children. She obtained a divorce from the husband-father of the children, on the grounds of habitual drunkenness, the decree reserving jurisdiction as to alimony. Subsequently she obtained a judgment order against him for unpaid child support and fees. Before the entry of such order she married Roger Lowrey, her present husband who, after the date of the judgment, adopted the children. Defendants filed motions to dismiss on grounds of failure to state a cause of action which were sustained by the court below and judgment entered against plaintiffs, who appeal.

Plaintiffs maintain that their complaint states a cause of action. We are satisfied that the opinion in *St. Clair* v. *Douras, et al.*, 21 Ill. App. 2d 444, settles the point. In that case, a construction of the amended Act identical with that urged by appellee in this case was rejected by the court. At page 450, Mr. Justice McCormick said:

> "It is the contention of the defendants that the provision of the statute to the effect that the action must be brought in the name of the person injured, from whom the said support was derived, should be considered as meaning that there could be no recovery unless a physical injury had been incurred by the person providing the support and that the decisions of the

Illinois courts interpreting the Act before the amendment are no longer applicable. To so hold would, in our opinion, require a strained construction of the statute. If the legislature had so intended it would have so stated. In the Act as amended the term 'injured' or 'injuries' is used several times, and the meaning must be interpreted considering the subject to which the word refers and with reference to the context. * * * The provision in the Dram Shop Act that 'an action shall lie for injuries to means of support, caused by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, resulting as aforesaid' is substantially the same as the provision was before the amendment. This sentence in the amendment creates the right of action for injuries to means of support. *Huckaba* v. *Cox*, 14 Ill. 2d 126, 130. The word 'injuries' there used does not mean physical injuries. It means that the person entitled to support received an injury through being deprived of means of support and that such injury was a violation of his legal rights. *Jury* v. *Ogden*, 56 Ill. App. 100, 105."

And in summary, on page 452, the court concluded:

"Reading the entire amendment we find that it was not the intention of the legislature to limit actions brought for injury to means of support to cases where death or a physical injury was suffered by the person furnishing the support, and we hold that the cases which were decided under the Act before the amendment construing the provision creating the right of action for injuries to means of support are still controlling."

The court had squarely before it the question of whether the 1955 amendments recognized that a cause of action could arise in favor of a person claiming a loss of support when that loss resulted without physical injury to the provider of the support. In that case the provider of the sup-

port had been incarcerated for the commission of a criminal act while intoxicated and as a result was unable to support the claimant. After a thorough examination of the authorities the court came to the conclusion, and we think rightly so, that the statutory language was substantially the same as it had been before the amendment and that the injuries referred to are the injuries to the person entitled to support through being deprived of his legal rights whether or not it results from physical injury to the provider of the support. The court made a careful survey of the authorities. It is therefore perfectly clear that the cause of action does not have to be for physical injuries to the provider of the support.

II. (a) *Stellers* v. *Miles*, 17 Ill. App. 2d 435, relied upon by appellees, did not involve the question of whether injury to the provider of the support is a necessary part of the cause of action under the Dram Shop Act. It dealt only with the problems of joinder of parties and maximum amounts recoverable, neither of which were raised in this court.

(b) The order of the trial court in dismissing the complaint indicates that it was based upon the erroneous contention of the defendant that the loss of support must be the result of physical injury to the provider of the support. It applied to both counts of the complaint and to all parties. In this respect the dismissal of the complaint was improper and should be reversed.

III. However, appellee has raised certain other contentions which have not been disposed of by the foregoing analysis.

Appellee contends that the dismissal of the complaint is proper because it was filed more than one year after the

cause of action accrued and thus fails to comply with the one year limitation period of the amendment of 1955 (Ill. Rev. Stat. 1957, Chap. 43, sec. 135). The statute provides, in part:

> "An action shall lie for injuries to means of support, caused by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, resulting as aforesaid."

The terms "means of support" referred to in the statute has not been restricted to the support which the person intoxicated was found legally obligated to furnish, but has been held to include the loss of income which results from the termination of voluntary contributions. *Pearson* v. *Renfro*, 320 Ill. App. 202. But "means of support", as used in the statute, has consistently been construed to require that the person intoxicated did in fact render support, whether or not he was legally required to do so. *McClure* v. *Lence*, 345 Ill. App. 158. No action will lie for damages based on a future potentiality of support not presently provable. *Robertson* v. *White*, 11 Ill. App. 2d 177. Here there was a total lack of support for more than one year prior to the filing of the complaint. There was no support rendered in fact. Therefore, at no time during the one year preceding the filing of this cause of action could the plaintiffs claim to be deprived of the nonexistent support. The Limitation Act, which would toll the running of the limitation on recovery until the children reached their majority, is not to be applied to actions under the Dram Shop Act. *Thompson* v. *Capasso*, 21 Ill. App. 2d 1.

IV. Appellant contends that the trial court abused its discretion in refusing to allow amendment of its complaint. In *Thomas* v. *Carroll Const. Co.*, 14 Ill. App. 2d 205, at page 210, the court said:

(Appendix)

"The trial court has discretion with respect to allowance of amendments to pleadings and it is not prejudicial error to refuse an amendment unless there has been a manifest abuse of this discretion. (*Deasey* v. *City of Chicago*, 412 Ill. 151, 156-157)."

In *Joyce* v. *Blankenship*, 399 Ill. 136, it was held that it is proper to dismiss a complaint when there is no equity on its face, and it is manifest that no amendment could aid it. In the instant case, the complaint was defective on its face, for the period during which an action could be brought had expired. No amendment could rejuvenate the dead cause of action. There was no abuse of discretion by the trial court in refusing to allow amendment in this instance.

For the reasons indicated, the judgment of the trial court is affirmed.

Judgment Affirmed.

BURKE and FRIEND, JJ., Concur

APPENDIX "B"

Opinion of the Supreme Court of Illinois.

Mr. Justice Solfisburg delivered the opinion of the court:

This case involves a construction of the Liquor Control Act, (Ill. Rev. Stat. 1957, chap. 43, par. 135,) and the limitations contained therein in relation to alleged loss of support caused by habitual drunkenness.

Plaintiff Beatrice Lowrey brought suit for herself and on behalf of two minor children against the defendant dramshops. The complaint was filed in the Circuit Court of Cook County on April 3, 1958. It alleged that the plaintiff Beatrice Lowrey obtained a divorce from Edward Janowiak, Jr., hereinafter called husband, on November 10, 1954, on the ground of habitual drunkenness. The complaint further alleged as follows: "Thereafter, pursuant to notices and petitions filed, judgment was entered in the same cause on behalf of this plaintiff against said husband on April 23, 1957, in aggregate sum of $1590.00, for accrued support and fees. Since the entry of such decree of divorce and to this date, husband has at no time whatever paid any money to plaintiff on account of support or costs or fees either for this plaintiff or the minor children as more fully set forth hereinafter. Plaintiff subsequently married Roger Lowrey on or about January 8, 1955. During the period of years above referred to, the husband was from time to time gainfully employed, and except for his excessive inbibing of intoxicating liquors was and would have been fully capable of properly supporting plaintiff and the minor children. Directly due to such drinking said husband was discharged from his regular employment.

Plaintiff charges that throughout such period of years above referred to, husband purchased or obtained by gift intoxicating liquors from all the defendants, jointly or severally, resulting in his habitual intoxication throughout such periods, without any fault or cause on the part of this plaintiff."

The several defendants filed separate motions to dismiss, all setting forth in substance that the complaint did not state a cause of action under the Liquor Control Act, and that the complaint was barred by the limitation provision of the act. Upon hearing the trial court dismissed the complaint and thereafter denied plaintiffs leave to file an amended complaint. The Appellate Court for the First District affirmed and we granted leave to appeal.

Plaintiffs contend that their complaint states a cause of action for loss of support and is not barred by the limitation provision of the Liquor Control Act. Defendants insist that the complaint does not state a cause of action, in that it does not allege injury or death to the provider of support, and in any event suit was not commenced within one year after the cause of action accrued.

The applicable provisions of the Liquor Control Act (Ill. Rev. Stat. 1957, chap. 43, par. 135,) are as follows: "Every person, who shall be injured, in person or property by any intoxicated person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person; * * * An action shall lie for injuries to means of support, caused by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, resulting as aforesaid. Such action shall be brought by and in the name of the person injured or the personal

representative of the deceased person, as the case may be, from whom said support was furnished, and the amount recovered in every such action shall be for the exclusive benefit of the person or persons injured in loss of support, and shall be distributed to such persons in the proportions determined by the judgment or verdict rendered in said action. * * * provided that every action hereunder shall be barred unless commenced within one year next after the cause of action accrued."

We turn first to the issue of the one-year limitation on the right to sue, which the Appellate Court regarded as dispositive of this case. The one-year proviso contained in the act is a special limitation upon a statutory cause of action, and as such is distinguishable from the general statutes of limitation which applied prior to the 1955 amendment to the act. *Desiron* v. *Peloza*, 308 Ill. App. 582; Ill. Rev. Stat. 1957, chap. 83, par. 15.

A similar limitation in the Injuries Act has been repeatedly held to be a condition precedent to the right of recovery, which must be observed in all events. (*Wilson* v. *Tromly*, 404 Ill. 307; *Fitzpatrick* v. *Pitcairn*, 371 Ill. 203; *Hartray* v. *Chicago Railways Co.*, 290 Ill. 85.) In addition to these persuasive authorities, we held that the legislature intended to apply the dramshop limitation retroactively to prevent the evil of prolonged liability of dramshop owners who rarely have an actual knowledge of the events upon which their liability is based. *Orlicki* v. *McCarthy*, 4 Ill. 2d 342, 353.

The Appellate Courts of this State have consistently held this special limitation of the Liquor Control Act applicable to minor plaintiffs. (*Shelton* v. *Woolsey*, 20 Ill. App. 2d 401, 405; *Steiskal* v. *Straus*, 3 Ill. App. 2d 479.) The United States Court of Appeals for the 7th Circuit

also specifically found that the special limitation of the Liquor Control Act is applicable to minors in *Seal* v. *American Legion Post No. 492*, (7th Cir.) 245 F. 2d 908. Because of the plain language of the act, and the evident purpose of the limitation, we agree with the foregoing authorities. We know of no such compelling reason that should induce this court to engraft an exception onto the plain language of the act. We, therefore, hold that the present action involving minor plaintiffs, was required to be filed "within one year next after the cause of action accrued."

This conclusion, however, is not dispositive of the case until it is determined when this cause of action accrued. While plaintiffs are somewhat vague as to the time they contend the cause of action accrued, they have suggested that this is a type of continuing tort and limitations begin to run only when the tortious overt acts cease. In support of this position they cite *Rogers* v. *Dwight*, (E.D. Wis.) 145 F. Supp. 537, a Federal trial court decision overruling a motion to dismiss a dramshop complaint for habitual drunkenness on the ground that suit was not filed within two years of the accrual of the cause of action. We do not regard that case as persuasive authority here, since the memorandum opinion does not set forth the pertinent allegations of the complaint in that case.

In the case at bar, the complaint clearly alleges the concurrence of the sale of liquor, the habitual drunkenness, and the consequent loss of support as early as November 10, 1954. At that time all of the essential elements of the alleged cause of action were in existence, and the cause of action had accrued. Public policy does not require that a dramshop operator be made perpetually liable for the consequences of the sale of liquor. (*Orlicki* v. *McCarthy*, 4

Ill. 2d 342, 353.) The legislature has required that the beneficiaries of the protection of the Liquor Control Act must bring their action within one year of the accrual of the cause of action. We would be unjustified in judicially legislating an exception in cases of habitual drunkenness:

In a suit under the Liquor Control Act, it is the obligation of the plaintiffs to allege facts bringing them within the compass of the act. (*Hartray* v. *Chicago Railways Co.*, 290 Ill. 85.) In the case at bar, the plaintiffs have failed to bring themselves within the one-year limitation and their complaint was properly dismissed.

Plaintiffs however, also argue that the trial court abused its discretion in refusing to permit them to file an amendment to their complaint after the original complaint was dismissed. The trial judge has broad discretion in permitting or refusing amendments and we will review only a manifest abuse of such discretion. (*Deasey* v. *City of Chicago*, 412 Ill. 151, 156; *Joyce* v. *Blankenship*, 399 Ill. 136.) In the present case we are powerless to review the exercise of discretion by the trial judge, as plaintiffs have failed to incorporate the proferred amendment in their record on appeal. We must, therefore, assume that the refusal to permit such an amendment was not prejudicial to plaintiffs.

We believe that the complaint was properly dismissed on the ground that it was not filed within one year next after the cause of action, if any, accrued.

Because of the foregoing conclusions, we hold that the trial court was correct in entering judgment for defendants. The judgment of the Appellate Court must accordingly be affirmed.

Judgment affirmed.